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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

MICHAEL BEN-LEVI,

Appellant,

v.

SHARON E. BEN-LEVI,

Appellee.

On Appeal From the Superior Court of
the State of New Jersey, Appellate Division

JURISDICTIONAL STATEMENT

MICHAEL BEN-LEVI
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TWO - PART FEDERAL QUESTION PRESENTED

A. Are *in rem* rules at **modification** of child custody proceedings[1] consistent with the standard of fairness as required by the Due Process Clause of the Fourteenth Amendment to the Constitution?

B. Given that custody is a right "far more precious . . . than property rights,"[2] do *in rem* jurisdictional requirements violate the Equal Protection Clause of the Fourteenth Amendment by not granting to nonresident defendants at **modification** of child custody proceedings protection equal to that of nonresident defendants at modification of child support proceedings?

LIST OF ALL PARTIES

This appeal draws in question the constitutionality of three New Jersey statutes. Therefore, Title 28 of the United States Code, Section 2403(b) may be applicable. Consequently, the Appellant notified the Clerk of the Superior Court of New Jersey, Appellate Division and the Attorney General of the State of New Jersey of this possibility.

In compliance with Rule 28.4.(c) of this Court, the Attorney General of the State of New Jersey will be served with a copy of this Jurisdictional Statement.

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[1]These *in rem* rules and jurisdictional requirements are contained in the following three New Jersey statutes: N.J.S.A. 9:2-l; 2A:34-32; and 2A:34-33.

[2]*May* v. *Anderson*, 345 U.S. 528, 533 (1953); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972); and *Weinberger* v. *Salfi*, 422 U.S. 749, 771 (1975).

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Superior Court of New Jersey, Appellate Division dated November 17, 1980, which upheld the validity of three New Jersey statutes whose jurisdictional rules governing the modification of a foreign child custody decree permit their courts without any requirement of a defendant-forum nexus to adjudicate and terminate the custodial rights of nonresident defendant parents granted under a foreign judgment.

On February 9, 1981 the Supreme Court of New Jersey declined to assume jurisdiction when it denied a Petition for Certification which was timely filed.

Appellant submits this statement to show there is a basis for the Supreme Court of the United States to note probable jurisdiction and that a substantial federal question is presented.

OPINION BELOW

The judgment of the Superior Court of New Jersey, Appellate Division was rendered in the form of an unreported Per Curiam. A copy is appended to this statement as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28 of the United States Code, Section 1257, subparagraph (2), on the ground that the decision below upheld the validity of three New Jersey statutes which the Appellant from the very beginning claimed are repugnant to both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In a judgment decided on November 17, 1980, the Superior Court of New Jersey, Appellate Division held that the "jurisdictional doctrines concerning status" contained in those statutes "are consistent with procedural due process." Appendix A, page 9.

On December 10, 1980 the Appellant filed a Notice of Petition for Certification which was followed by a Petition for Certification. The Supreme Court of New Jersey denied certification on February 9, 1981. See Appendix B. The Notice of Appeal to this Court was filed with the Superior Court of New Jersey, Appellate Division on February 27, 1981. For a copy see Appendix C.

Cases which sustain the jurisdiction of this Court are:

Estin v. *Estin*, 334 U.S. 541 (1948);
May v. *Anderson*, 345 U.S. 528 (1953);
Shaffer v. *Heitner*, 433 U.S. 186 (1977); and
Kulko v. Superior Court of California, 436 U.S. 84 (1978).

In the event the Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to Title 28 of the United States Code, Section 2103.

STATE STATUTES INVOLVED

The validity of the following three New Jersey statutes is called into question: N.J.S.A. 9:2-1, 2A:34-32, and 2A:34-33. The text of each statute is set out in Appendix D.

The only procedural due process of law requirements contained in these statutes are that reasonable notice and opportunity to be heard be given to a nonresident defendant. These are the requirements for *in rem* jurisdiction.

N.J.S.A. 2A:34-32 and 2A:34-33 are patterned after sections 4 and 5, respectively, of the Uniform Child Custody Jurisdiction Act (1968). The Commissioners' Note following section 12 of the Act upholds the adequacy of *in rem* jurisdiction. See 9 U.L.A. 111, 150 (1979). The jurisdictional requirements of the Act make no distinction between an initial custody decree issued by a divorce court where *in rem* jurisdiction is adequate, and post-divorce modification of custody proceedings in a second forum state.

STATEMENT OF THE CASE AND THE RAISING OF THE FEDERAL QUESTION

The underlying issue in this case is whether *in rem* jurisdictional rules governing the modification of a foreign custody decree meet constitutional standards for procedural due process of law. Without the Appellant having had prior contact with the forum, the Superior Court of New Jersey adjudicated and terminated at *ex parte* proceedings the custodial rights recently granted him by the Superior Court of California, the court of original and continuing jurisdiction. Subsequently, the

Superior Court of California did not grant full faith and credit to the New Jersey *ex parte* modification judgment, and it thereupon reaffirmed its prior joint custody order. There now exist two contradictory custody decrees, each valid in its own jurisdiction. This conflict of laws has resulted in a total disruption in the father-child relationship.

The Appellant and Mrs. Ben-Levi were married in California in 1968. Two children were born of the marriage: Joseph, born July 2, 1969, and Rachel, born February 10, 1971. Dr. and Mrs. Ben-Levi were separated in March 1973, and a final judgment of dissolution was entered in the Superior Court of California in December 1974. Custody of the children was awarded to Mrs. Ben-Levi (Appendix A, page 1).

Litigation took place at Torrance, California during the spring of 1978 when Mrs. Ben-Levi requested a significant reduction in the frequency of visitation. Dr. Ben-Levi countered by filing for joint custody. On April 26, 1978 the Superior Court of California ordered the parties and the children to the Neuro-Psychiatric Institute at U.C.L.A. for an evaluation. At the final hearing on June 28, 1978, the court issued a joint custody Order which was entered on July 18, 1978 (Appendix A, page 2).

Under the terms of the joint custody Order, legal and physical custody was to alternate annually. Dr. Ben-Levi had petitioned the court for a restraining order to prevent the removal of the children from the State, but the trial judge stated that California law places no restriction on the location of where a parent exercising custody may reside. Mrs. Ben-Levi, who was awarded the first year of custody under the new decree, relocated to the State of New Jersey.

Nine months after the entry of the California decree, the Appellee, Mrs. Ben-Levi, filed a Complaint on April 27, 1979 with the Superior Court of New Jersey under N.J.S.A. 9:2-1 seeking sole custody. Dr. Ben-Levi, the Appellant, remained a resident of California and was served constructively (Appendix A, page 5). On June 4, 1979 Dr. Ben-Levi filed with the Superior Court of California an Order to Show Cause, and a hearing was scheduled for June 29, 1979 (Appendix A, page 6).

One week later, on June 12, 1979, the Appellant filed with the Superior Court of New Jersey a Motion to Dismiss for Lack of Jurisdiction Over the Person and Subject Matter (Appendix A, page 5). In a Memorandum of Points and Authorities and accompanying Certification which were annexed to the Motion to Dismiss, Dr. Ben-Levi stated under penalty of perjury that he lacked the requisite minimum contacts with the State of New Jersey as to make it fair to require defense of the action in that forum. He pointed out that under the terms of the recently entered California joint custody Order, his turn at becoming the custodial parent was scheduled to begin.

In support of his Motion to Dismiss, Dr. Ben-Levi relied on *May* v. *Anderson*, 345 U.S. 528, 533 (1953) as the basis for maintaining that custody is a personal right, and without exercising *in personam* jurisdiction, a foreign court could not deprive a nonresident defendant parent of his custodial rights. This point was made on page 4 of his Memorandum of Points and Authorities. On page 5 of the Memorandum, Dr. Ben-Levi also cited *Kulko* v. *Superior Court of California*, 436 U.S. 84, 91 (1978) in stating that the Due Process Clause of the Fourteenth Amendment operates a limitation on the jurisdiction of state courts to enter judgments affecting the rights or interests of nonresident defendants.

A hearing on the Motion to Dismiss took place on June 15, 1979 at Trenton, where the Appellant, *pro se*, made a special appearance to challenge the jurisdiction of the court. Due to the fact Dr. Ben-Levi had virtually no prior contact with the forum, the only issue of law discussed at that hearing was the adequacy of *in rem* jurisdiction. The trial judge stated that the presence of the children was a sufficient basis for jurisdiction to make a custody determination. Therefore, the Superior Court of New Jersey denied the Motion to Dismiss, invoked *parens patriae* jurisdiction, and scheduled a plenary custody hearing for June 26, 1979 (Appendix A, page 6).

The Appellant immediately filed a Motion for Stay relative to the New Jersey plenary custody hearing so he could perfect an appeal on the issue of jurisdiction (Appendix A, page A6). In the Certification accompanying the Motion for Stay, the Appellant again raised the constitutional issue. The Motion for Stay was denied, so the defendant (Appellant) withdrew from the case. A plenary custody hearing was held on June 26, 1979. The Appellee was awarded temporary custody pending a New Jersey Probation Department investigation and report.

Three days later, on June 29, 1979, the scheduled hearing at Torrance, California took place. No appearance was made by the Appellee or by anyone on her behalf. At that hearing the California trial judge requested that Dr. Ben-Levi provide the court with a transcript of the New Jersey proceedings. He also asked Dr. Ben-Levi to send the New Jersey trial judge a transcript of the California hearing of June 28, 1978 which indicated that the joint custody Order incorporated the terms of a separation agreement based on proposals made in open court that day by counsel for the respondent (Mrs. Ben-Levi) and agreed to in open court by Dr. Ben-Levi.

On August 27, 1979, after reading the transcript of the June 26, 1979 New Jersey custody hearing, the California trial judge continued the proceedings "to await further developments in New Jersey." Appendix A, pages A7-A8. The California trial judge also expressed confidence that in the end the New Jersey trial judge would grant full faith and credit to the California joint custody decree and order the return of the children to California.

A New Jersey custody hearing took place on January 7, 1980 where a final judgment was issued awarding the Appellee sole custody of the minor children. This Final Judgment of Custody was entered on January 18 and filed on January 23, 1980.

A Notice of Appeal was filed with the Superior Court of New Jersey, Appellate Division on February 15, 1980. In Paragraphs 12 and 13 of the Notice of Appeal, the Appellant drew in question the validity of N.J.S.A. 9:2-1, 2A:34-32, and 2A:34-33. The Appellant, in Paragraph 10 of the Notice of Appeal, based his constitutional challenge on the Due Process Clause of the Fourteenth Amendment. The federal question was formalized under Points VI and VII of the Brief for Appellant.

From the very beginning, the Appellant was careful to delimit the scope of the federal question so that it would apply only to modification of custody proceedings. He deliberately excluded custody determinations made at divorce proceedings where an initial award is made. The Appellant concedes that *in rem* jurisdictional rules governing the adjudication of the marital status are consistent with the standard of fairness which is required by due process of law. Moreover, it stands to reason that whenever a divorce court has jurisdiction over minor children, it cannot dissolve a marriage without making an initial award of custody.

Dr. Ben-Levi submitted to the Superior Court of California a copy of the New Jersey Brief and Appendix for Appellant and a stenographic transcript for each of the four New Jersey proceedings. On March 6, 1980, "the Superior Court of California, after a review of the New Jersey proceedings, reaffirmed its prior joint custody Order of July 18, 1978." Appendix A, page A8.

On November 17, 1980, the Superior Court of New Jersey, Appellate Division issued a Per Curiam affirming the judgment of the New Jersey trial court that denied the Appellant's Motion to Dismiss and which modified the California joint custody Order. Without making specific reference to the statutes whose validity was drawn in question, the Per Curiam upheld their validity by stating that the "jurisdictional doctrines concerning status" contained in those statutes, "are consistent with procedural due process." Appendix A, page A9. On page 9 of the Appellate Brief submitted on behalf of the Plaintiff-Respondent, jurisdiction was justified not only under N.J.S.A. 9:2-1, but under N.J.S.A. 2A:34-32 and 2A:34-33 as well.

A Notice of Petition for Certification was timely filed on December 10, 1980. In a Brief submitted to the Supreme Court of New Jersey in support of the Petition, the Appellant raised the two-part federal question which appears in this Jurisdictional Statement. See Appendix E for a certified copy. On February 9, 1981 the Supreme Court of New Jersey denied certification. A Notice of Appeal to this Court was filed with the Clerk of the Appellate Division on February 27, 1981.

As it now stands, two inconsistent custody judgments, each valid in its own jurisdiction, has resulted in a complete breakdown in the father-children relationship. The Superior Court of California did not grant full faith and

credit to the New Jersey *ex parte* modification and continues to retain jurisdiction. The California joint custody Order is valid in California and can only be superseded by the New Jersey judgment if the State of New Jersey can acquire personal jurisdiction over the Appellant.

Each parent is interested in protecting his or her custodial rights. Neither will do anything which might jeopardize the judgment favorable to these rights. The price of visitation in New Jersey is submission to the jurisdiction of the court and the loss of custodial rights. See Final Judgment of Custody, Paragraph B (Appendix A, page A8). In *Shaffer* v. *Heitner*, 433 U.S. 186, Delaware held stock to compel a general appearance. In the instant case, New Jersey has 'held' the inherent right of a parent to visit with his children.

For almost two years, the Appellant has not entered the State of New Jersey or maintained any contact with his children so as not to provide the basis for acquiring *in personam* jurisdiction. Neither can the Appellee permit the minor children to visit with their father in California. In effect, New Jersey has been transformed from a forum state into a fortress state where the father dare not enter and the children dare not leave.

This case is to child custody as *Williams* v. *North Carolina*, 317 U.S. 287 (1942) was to divorce. It involves more than a federal question regarding an alleged violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution. Equally important is the urgent need for a definitive ruling on whether the standard of fairness and procedural due process of law require a defendant-forum nexus at modification of custody proceedings. The resolution of that constitutional issue will preclude the existence of two, equally valid, conflicting decrees.

THE FEDERAL QUESTION IS SUBSTANTIAL

This case raises a question of substantial importance under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

A. The federal question has been raised and discussed in several law journals.

Recent law review articles have raised and discussed the federal question contained in this appeal.[3] *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), and *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978) "have reopened fundamental questions concerning the proper basis for state-court jurisdiction" and "raised many questions as to the exact reach of the minimum contact rule" when applied to litigation involving custody and adoption. 12 U. C. D. L. Rev. 229, 234 (1979).

Professor Bodenheimer pointed out with concern that "legal uncertainty as to the validity of adoption and custody decrees could throw the lives of countless children into turmoil." *Id.*, at 232. The urgency of resolving the controversy regarding the proper basis for state-court jurisdiction at custody proceedings was underlined when Bodenheimer, citing the U.S. Bureau of the Census statistics, noted that "[m]ore than one million children are added each year to the millions of children of divorce whose lives are already governed by divorce custody decrees." *Id.*, n. 21.

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[3]See Bodenheimer and Neelye-Kvarme, *Jurisdiction over Child Custody and Adoption After Shaffer and Kulko*, 12 U. C. D. L. Rev. 229 (1979); Commentary, *The Due Process Dilemma of the Uniform Child Custody Jurisdiction Act*, 6 Ohio North L. Rev, 586 (1979); Notes, *Jurisdiction — Uniform Child Custody Jurisdiction Act*, 51 Temp. L. Q. 139, 148, n. 66 (1978); Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 Iowa L. Rev. 997, 1006 (1978).

The author of one law review Commentary suggested that "the provisions of the Uniform Child Custody Jurisdiction Act that authorizes a state court to adjudicate and thereby terminate the custody interests of a nonresident defendant parent over whom the court has no personal jurisdiction" . . . "may not withstand scrutiny under the interrelated holdings of *Shaffer* v. *Heitner* and *Kulko* v. *Superior Court.*" 6 Ohio North L. Rev. 586 (1979).

While there is consensus that *Shaffer* recognizes the forum-litigation-plaintiff nexus as sufficient for granting a divorce,[4] there is disagreement as to whether an exception also applies to custody,[5] especially when modification proceedings take place in a second forum state.

The traditional jurisdictional view regarded custody litigation as proceedings *in rem* or *quasi in rem.*[6] For many years, however, this was also coupled with the provision that only the state of the child's domicile was competent to confer the right to custody.[7] The domicile of the child was that of the parent exercising lawful custody; therefore, under those circumstances it was unlikely for a custodial parent to be a nonresident defendant at modification of custody litigation.

Gradually, the jurisdictional basis for the modification of custody proceedings was expanded. Current case law, as reflected by the revision contained in the Restatement (Second) of Conflict of Laws, § 79 (1971), now recognizes

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[4]See Vernon, 63 Iowa L. Rev. 997, 1006 (1978). Also see *In re Marriage of Rinderknecht,* 367 N. E. 2d 1128, 1135 (Ind. Ct. App. 1977).

[5]See Commentary, 6 Ohio North L. Rev. 586, 592 (1979).

[6]See T. Brown, Commentaries on the Jurisdiction of Courts, §79 (1891).

[7]Restatement, (First) Conflict of Laws, § 117 (1934); 2 Beale, Conflict of Laws, § 144.3 (1935).

the physical presence of the child within the state as a sufficient basis for jurisdiction to make a custody determination. This jurisdictional doctrine permits a forum state to render an *ex parte* modification of custody judgment, thereby laying the basis for the existence of two, equally valid, conflicting decrees.

B. Custody is a personal right which cannot be terminated by a foreign court on the basis of *ex parte* proceedings.

The jurisdictional adequacy of *ex parte* proceedings in the area of family law came under review in three leading cases. Common to all three is the rule that a court at *ex parte* proceedings cannot extinguish any right of an absent spouse arising from the marriage.

In *Estin* v. *Estin*, 334 U.S. 541 (1948), the *Estin* Court expounded the divisibility of divorce concept. Though the requirements of procedural due process are satisfied on the basis of *ex parte* proceedings for the purpose of altering the marital status, and that part of the decree must be accorded full faith and credit in all States; however, without exercising *in personam* jurisdiction, a court cannot "under any circumstances adjudicate rights" granted a defendant under a foreign judgment. 334 U.S., at 544, 547.

This protection was extended in *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957) to include any future claim or right arising from the marriage which had not been reduced to judgment prior to the *ex parte* proceedings. 354 U.S., at 418. Both *Estin* and *Vanderbilt* involved the right to alimony. In *May* v. *Anderson*, 345 U.S. 528 (1953), the issue was child custody. Making specific reference to *Estin, supra*, the *May* Court stated the following:

"[T]his Court upheld the validity of a Nevada

> divorce obtained *ex parte* by a husband, resident in Nevada, insofar as it dissolved the bonds of matrimony. At the same time, we held Nevada powerless to cut off, in that proceedings, a spouse's right to financial support under the prior decree of another state. In the instant case, we recognize that a mother's **right to custody** of her children **is a personal right entitled to at least as much protection** as her right to alimony." 345 U.S., at 533-534. [Emphasis added.]

This was the first time the Supreme Court of the United States defined the right of a parent to custody as a personal right; a right which could only be terminated by a court exercising *in personam* jurisdiction.

> "[W]e have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam.* **Rights far more precious** to appellant **than property rights** will be cut off if she is to be bound by the Wisconsin award of custody." 345 U.S., at 533. [Emphasis added.]

Though the Burton opinion in *May* was a plurality, the statement that custody is a right "far more precious . . . than property rights" has been cited in two subsequent majority opinions. See note 2, *ante*, at iii.

As a precious personal right, custody is entitled to at least the same protection given property or pecuniary rights. To give it less protection offends the concept of distributive justice. The denial of this protection at custody litigation outside of divorce proceedings violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

C. All assertions of state-court jurisdiction must be evaluated according to the minimum contacts standard.

The traditional distinction between *in rem* and *in personam* jurisdiction, which permitted a double standard for procedural due process, was called by this Court an ancient form. *Shaffer* v. *Heitner,* 433 U.S., at 212.

> "Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant." *Ibid.*

The concept of personal jurisdiction over a nonresident defendant is part of a carefully conceived balance between the prerogatives of the plaintiff and defendant regarding the location of the trial. Unless the defendant has maintained sufficient minimum contact with the forum state of the plaintiff to make it a fair forum, it is the plaintiff who will have to come to the forum state of the defendant in order to pursue the action. The Due Process Clause of the Fourteenth Amendment protects a nonresident defendant from having to conduct a defense of his rights in a forum state with which he has had no prior contact. *Kulko,* 436 U.S., at 91.

In *Shaffer, supra,* this Court held that all assertions of state-court jurisdiction must be evaluated according to the minimum contacts standard. In footnote 30 of that Opinion this Court also indicated that rules governing the adjudication of status would be exempt from a defendant-forum nexus if they were consistent with the standard of fairness. 436 U.S., at 208.

D. *In rem* rules governing modification of custody proceedings are not consistent with the standard of fairness.

Discussions regarding the impact of *Shaffer* upon status adjudications have focused on footnote 30.

> "[30]C.f. Smit, The Enduring Utility of In Rem Rules: A Lasting Legacy of *Pennoyer* v. *Neff.* 43 Brooklyn L. Rev. 600 (1977). We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness. See, *e.g.*, Traynor 660-661." 433 U.S., at 208.

Interpretations of that footnote are varied.[8] Although Bodenheimer was quick to include all categories of status adjudications under a "status exemption" from a defendant-forum nexus, she admits that "*Shaffer* does not enumerate the proceedings which fall within the 'status' category." 12 U. C. D. L. Rev., at 240.

The confusion over footnote 30 is best illustrated by the curious fact that the Per Curiam issued by the Superior Court of New Jersey, Appellate Division and the Briefs submitted by the Appellant both cited that very footnote as the major authority in support of diametrically opposite positions!

Though footnote 30 of *Shaffer* has been widely cited, discussed, and interpreted, reference is made only to the second sentence of that footnote. The next short sentence is a clear follow-up. — "See, *e.g.*, Traynor 660-661." To a careful reader, these are code words stating that one should read the following reference in order to better understand what this Court had in mind. Yet, not one law journal ever mentioned the Traynor article.

In his article, Justice Traynor analyzed three types of status adjudications in terms of whether fair play would

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[8]See Bodenheimer, 12 U.C.D. L. Rev., at 240; Note, 51 Temp. L. Q., at 148-149; Commentary, 6 Ohio North L. Rev., at 592; and Vernon, 63 Iowa L. Rev., at 1006.

require a defendant-forum nexus. See 37 Tex. L. Rev. 657 (1959). He would exclude adjudications of the marital status from such a requirement. *Id.*, at 661.

When a child has been abandoned or a parent has failed to discharge his parental obligations, Traynor would permit an adoption notwithstanding lack of personal jurisdiction over that parent. *Id.*, at 662.

However, relative to the parent-child relationship at proceedings outside of divorce actions, Justice Traynor feels that fair play requires a defendant-forum nexus.

> "There is an element of contract and some equality of parties in the marital relationship. These are lacking in the parent-child relationship, and the interest of the state therefore becomes correspondingly larger in any action involving parent and child. Contracts of both parties with the state also take on larger and perhaps paramount importance, since the consequences of any action either declaring or terminating the relationship are so momentous to the parties. **In conjunction with fair play, these considerations would normally preclude jurisdiction over a nonresident defendant having no contact with the forum state.**" *Id.*, at 661. [Emphasis added.]

Earlier in the article, Traynor distinguishes between the regret by a nonresident respondent at the termination of a marital relationship at *ex parte* divorce proceedings, and the outrage an absent defendant would rightly feel at the termination of a parent-child relationship by a foreign court at *ex parte* proceedings. *Id.*, at 660.

If one reads the second sentence of footnote 30 in conjunction with the Traynor article mentioned in the third sentence, it would be unwarranted to conclude that the footnote has exempted modification of custody proceed-

ings from a defendant-forum nexus. On the contrary, there is good reason to believe that this Court would hold that fair play and substantial justice require prior contact with a forum before the courts of that state could exercise lawful jurisdiction over a nonresident defendant to adjudicate custodial rights under a foreign judgment.

Should this be the case, the continued use of *in rem* jurisdictional rules at modification of custody proceedings would constitute a denial of procedural due process.

The Ohio Northern University Law Review Note on the Due Process Dilemma of the Uniform Child Custody Jurisdiction Act made the following observation:

> "Courts and legislatures, for the sake of expediency, may simply operate on the utilitarian assumption that the UCCJA can survive *Shaffer*, . . . This assumption, however, is one of convenience, not substance. It merely postpones the inevitable confrontation with this issue." 6 Ohio North L. Rev., at 593.

The federal question presented in the instant case is so substantial as to require plenary consideration with briefs on the merits and oral arguments for its resolution. Footnote 30 provides both the criterion and methodology for the resolution of this controversy. The standard of fairness is the basis for deciding whether a defendant-forum nexus should be required at modification of custody proceedings. A test of reasonableness is the suggested method of analysis for making this determination. In an article mentioned in the first sentence of footnote 30, Smit suggests that *in rem* rules be subjected to a test of reasonableness based on a standard of reasonableness that weighs and balances competing interests. 43 Brook. L. Rev. 600, at 606-607 (1977).

The traditional analysis of this type usually considers only the interests of the plaintiff, defendant, and the forum state of the plaintiff. In litigation involving the modification of a foreign custody decree, the interests of the forum state of the defendant, which is invariably the home state of the child, cannot be ignored.[9] The most important consideration of all are the possible deleterious effects *in rem* jurisdictional rules might have on the best interests of the children involved in interstate modification of custody litigation.

E. Modification of custody proceedings based on *in rem* rules are not in the best interests of children.

The jurisdictional doctrines underlying N.J.S.A. 9:2-1 and N.J.S.A 2A:34-32 and 2A:34-33 are not the same. The former is based on a broadly defined doctrine of *parens patriae*. The latter two statutes contain the jurisdictional requirements of the Uniform Child Custody Jurisdiction Act.

A broadly defined doctrine of *parens patriae* has been abused by those who viewed it as an open invitation to forum shop. Children are transported into another state by a parent seeking a more favorable judgment with the view of relitigating the issue of cutody. In most cases the minor children have only resided in the second forum state for just a few months or even weeks.[10]

There is a direct correlation between the removal of

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[9]California, where the Ben-Levi children were born and lived for nine years, and where their father and all of their paternal and maternal relatives continue to reside, has at least as much interest in its continuing jurisdiction as New Jersey in assuming concurrent jurisdiction based on a ten month temporary residence of the children.

[10]See *In re Custody of Isizarry*, 195 Pa. Super. 104, 169 A. 2d 307 (App. Div. 1961); *Bergin* v. *Bergin*, 1971 439 F. 2d 1108 (3rd Cir. 1971); *Roebuck* v. *Robebuck*, 162 Mont. 71, 508 P. 2d 1057 (Sup. Ct. 1973).

minor children from their home state following bitterly contested custody litigation or their retention while on an out-of-state visit and the existence of a jurisdictional doctrine in the second forum state which is conducive to immediate jurisdiction and assured relitigation.

Recognition of this correlation led the authors of the Uniform Child Custody Jurisdiction Act to invalidate this broadly defined doctrine of *parens patriae* in section 3, subparagraph (b) of the Act (N.J.S.A. 2A:34-31(b)). Under the Uniform Act, the *parens patriae* powers of the state are reserved only in case of an emergency. See UCCJA, § 3.(3)(ii),(iii); N.J.S.A. 2A:34-31(3)(ii),(iii).

Under the more restrictive jurisdictional requirements of the Uniform Act, it is unlikely for a custodial parent exercising sole and exclusive custody to be a nonresident defendant at modification proceedings. The provisions of the Uniform Child Custody Jurisdiction Act, however, were designed to fit the traditional model where only one parent is awarded sole and exclusive custody. Therefore, it is possible under the Uniform Act for a co-custodial parent with a joint custody judgment of alternating annual periods of custody to be called upon to defend his continued right to custody in a forum state with which he has had no prior contact.

Professor Ratner, the chief architect of the Uniform Child Custody Jurisdiction Act, foresaw a situation of this type and suggested that modification jurisdiction in such cases be confined to the state where the defendant parent resides. 62 Mich. L. Rev. 795 (1964), at 822-823. This proposal was not incorporated into the Act.

Lack of provisions for joint custody arrangements would permit state-court jurisdiction which is fundamentally unfair to nonresident defendants. Neither is it fair to

require children to undergo custody relitigation in a second forum state. In all probability, the forum state of the defendant, as in the instant case, is the state of the marital domicile, the home state of the children, and the court of original and continuing jurisdiction.

Contradictory custody decrees occurred in the instant case despite the fact that both California and New Jersey had adopted the Uniform Child Custody Jurisdiction Act. New Jersey adopted the Uniform Act a full six months before the Superior Court of New Jersey entered a judgment modifying the California decree. Requiring a defendant-forum nexus at modification proceedings would preclude this from occurring. Jurisdictional rules which can permit conflicting custody decrees do not serve the best interests of children.

F. The constitutional rights of a nonresident defendant to procedural due process cannot be substituted for a doctrine based on convenience and discretion.

The New Jersey Legislature adopted the Uniform Child Custody Jurisdiction Act on July 3, 1979, effective immediately. However, on November 17, 1980 the Superior Court of New Jersey, Appellate Division issued a Per Curiam regarding a judgment entered on January 18, 1980 which continues to uphold the validity of a broadly defined doctrine of *parens patriae* even though this view is in conflict with N.J.S.A. 2A:34-31.

Moreover, the Superior Court of New Jersey was informed at the outset that California retained jurisdiction and custody proceedings were pending there. Consequently, on January 7, 1980, pursuant to N.J.S.A. 2A:34-42 (UCCJA, §14) the Superior Court of New Jersey should not have modified the California judgment in deference to California's continuing jurisdiction.

In large measure, jurisdiction under the Uniform Child Custody Jurisdiction Act is to be declined on the basis of inconvenient forum. "The doctrine of 'forum non conveniens' is not a doctrine of jurisdiction, but rather a doctrine of discretion, convenience, and expediency." *Blaustein* v. *Pan American Petroleum & Transport Co.*, 174 Misc. 601; 21 N. Y. S. 2d 651, 706 (Sup. Ct. 1940).

It is for this reason the Appellant raised a federal constitutional issue rather than base his appeal on violations of New Jersey State statutes. In defense of his constitutional right to procedural due process of law, the Appellant feels more secure in seeking the protection of jurisdictional doctrines under the federal constitution than on relying upon a doctrine based on discretion.

The choice of a forum by a plaintiff at modification of custody proceedings is deliberate. For two obvious reasons, the forum state of the defendant is to be avoided. In most cases the forum state of the defendant is the site of recent litigation where a judgment was rendered which the plaintiff considers unfavorable. More important is the location of the trial. Several writers have observed that courts tend to favor the local resident in an award of custody.[11] Given the opportunity to submit a Brief on the Merits, the Appellant will present data from a statistical study which indicates that the single most reliable predictor of the outcome of an award of custody at interstate custody litigation is the location of the trial.

The best interests of the child is, without question, a consideration which should override any concern regard-

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[11]See Dempsey, *Custody of Child — Jurisdiction*, 4 A. L. R. 2d 15 (1949); Foster and Freed, *Children and the Law*, 2 Fam. Law Q. 40, 49 (1968); and Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modification*, 65 Cal. L. Rev. 978, 995 (1977).

ing a defendant-forum nexus at modification of custody proceedings. The criterion for making a custody determination in all fifty states is the best interests of the child. Therefore, the only question is whether the forum state of the plaintiff or the defendant can make a more informed custody judgment. Under the doctrine of *forum non conveniens*, it is the forum state of the plaintiff which makes that determination. Smit noted the inadequacy of such an approach. At the same time he expressed regret at the lack of judicial restraint exhibited by "states that seek to extend their court's competence as far as possible." 43 Brook. L. Rev., at 607, n. 35.

In the event there are insufficient contacts to support an assertion of personal jurisdiction over a nonresident defendant at routine modification of custody proceedings, the only instance consistent with the standard of fairness where the Appellant believes a defendant-forum nexus should not be required is when the plaintiff can append to the complaint a certificate or an order issued by the forum state of the defendant stating that the best interests of the child are better served by having the forum of the plaintiff exercise jurisdiction.

G. Modification of custody litigation meets the criteria for *in personam* jurisdiction; it involves a financial obligation to pay child support as well as custodial rights.

Custody and child support are interrelated. A complaint seeking a change in custody, as in the instant case, will invariably request child support. The jurisdictional requirements for money judgments are more stringent than for the modification of custody. The *May* Court, however, expressed humanistic sentiments when it stated that custodial rights are far more precious than property or pecuniary rights and are entitled to at least as much protection. 345 U.S., at 553-534.

There are those who continue to differentiate modification of custody decrees from money judgments, claiming that only the latter should require *in personam* jurisdiction. It is important to point out that a change in custody automatically imposes upon the parent losing custodial rights an obligation to pay child support. This, in effect, makes modification of custody litigation an action requiring *in personam* jurisdiction even under traditional criteria because the issues before the court involve both custodial rights and financial obligations. Even when a court at *ex parte* modification proceedings is not competent to render a money judgment for child support against the absent nonresident defendant, there is, nevertheless, an implied financial obligation as evidenced by the fact that the court will reserve to the plaintiff application for child support. See Final Judgment of Custody, Paragraph C (Appendix A, page A8).

H. More than any other factor, *in rem* rules governing the modification of custody discourage parents from entering into reasonable visitation and separation agreements.

In *Kulko, supra,* this Court exempted the residence of ones minor children in another state from the "effects" rule and contacts upon which personal jurisdiction could be based. This was done in support of a public policy not to discourage parents from entering into reasonable visitation and separation agreements. 436 U.S., at 93.

If *in personam* jurisdiction could be based on the residence of minor children, a parent would be subject to a family law suit in any State of the Union where the other parent chose to spend time while having custody of their offspring pursuant to a separation agreement. *Ibid.*

The two major areas of post-divorce family law litigation are the modification of child support and the

modification of custody. As this Court pointed out, the Uniform Reciprocal Enforcement of Support Act of 1968 provides a mechanism which facilitates the procurement of child-support decrees where the dependent children reside in a state that cannot obtain personal jurisdiction over the nonresident defendant. *Id.*, at 98-99.

The primary factor discouraging most parents from entering into reasonable visitation and separation agreements is not being subject to suit relative to a modification of child support, but the real danger of having to defend ones right to custody in a totally foreign jurisdiction.

I. The federal question may have already been decided in *Kulko* when in quashing the process for lack of *in personam* jurisdiction, jurisdiction was denied not only to modify child support but to modify custody as well.

There are many similarities between *Kulko* v. *Superior Court of California, supra,* and the instant case. Both plaintiffs moved across the continent from the state of the marital domicile. Sharon Kulko Horn went from New York to California, while Sharon Ben-Levi moved from California to New Jersey. Each defendant remained in the state of the marital domicile and was served constructively relative to a complaint which requested a modification of child support and custody. Neither defendant had any significant prior contact with the forum state of the plaintiff. Both defendants filed a motion to quash or dismiss on the basis that the state court was without jurisdiction because the defendant lacked the requisite minimum contacts.

Unlike Dr. Ben-Levi, Dr. Kulko was no longer interested in retaining custody of his children; therefore, he "did not contest the court's jurisdiction for purposes of the custody determination." 436 U.S., at 88.

This aspect of *Kulko* led the legal literature on the case to incorrectly perceive of it solely in terms of child support. Though custody was not a contested issue between the parties, the complaint did request a modification of custody. Such modification can only be rendered by a court of competent jurisdiction.

Unreported in the literature on *Kulko* is the important fact that in quashing the process this Court denied jurisdiction not only to modify child support but to modify custody as well. See Point I of Appellee Horn's Petition for Rehearing, page 2.

The Petition for Rehearing went on to state that " . . . Mrs. Horn now must go to New York to get orders for custody, ..." *Ibid.* "Under the circumstances, jurisdiction as to custody has been denied improperly or inadvertently and should be reconsidered." *Id.*, at 3. The Petition for Rehearing was denied.

On the contrary, jurisdiction to modify custody in *Kulko* was not denied improperly or inadvertently. The decision to deny California jurisdiction altogether is totally consistent with *May* v. *Anderson, supra,* and *Shaffer* v. *Heitner, supra.*

J. A resolution of the federal question will preclude the existence of two, equally valid, conflicting custody decrees.

Article IV, §1 of the Constitution of the United States requires each State to grant Full Faith and Credit to the judicial proceedings of another State. This however, does not preclude the modification of a custody decree by a court of competent jurisdiction in a second forum state on grounds permitted by the laws of the rendering state. See *Halvey* v. *Halvey,* 330 U.S. 610, 615 (1947). On the other hand, a forum state need not grant full faith and credit to a custody decree rendered by a state not

exercising *in personam* jurisdiction. *May* v. *Anderson, supra,* at 533.

Nevertheless, courts have held that *in personam* jurisdiction is not required at modification proceedings, and that *in rem* jurisdictional rules at those proceedings are consistent with procedural due process of law. See Appendix A, page 9.

However, implicit in the *May* plurality opinion is the assumption that there is a jurisdictional defect in an *ex parte* custody judgment.

> "The clear implication of the Court's opinions in both *May* and *Vanderbilt*, notwithstanding Mr. Justice Frankfurter's opinion in *May*, is that recognition by another state of a decree unsupported by personal jurisdiction would constitute a denial of due process. . . . Surely the recognition of a void decree as a basis for depriving a citizen of something of value would constitute a denial of due process in any forum, ..." Comment, 33 U. Chi. L. Rev. 837 (1966), at 840-841.

The nature of this jurisdictional defect and whether procedural due process of law requires a defendant-forum nexus at modification of custody proceedings have not been made explicit by this Court.

It is this ambiguity which permits the existence of two contradictory custody decrees relative to the same children. A definitive ruling by this Court on the federal question will preclude this from occurring.

If this Court holds that *in rem* jurisdictional rules at modification of custody proceedings are consistent with procedural due process, then the modification decree by the second forum state supersedes the prior judgment. On the other hand, should this Court hold that procedural

due process of law requires a defendant-forum nexus at modification of custody proceedings, then the second forum state was without jurisdiction.

As much as the Appellant feels that *in rem* jurisdictional rules violate procedural due process of law, it is better that this Court affirm the opinion below than deny probable jurisdiction. Better that this constitutional issue be resolved one way or the other than the continued existence of conflicting status judgments "which could not help but bring 'considerable disaster to innocent persons.'" *Williams* v. *North Carolina,* 317 U.S., at 301.

The current legal void in this area of family law leaves families unprotected and minor children subject to severe trauma and total separation from one parent. Even if both parents pledge not to violate the law, the parent possessing the children can feel safe in retaining physical custody only if the children do not cross state lines. Forty-eight states are a legal 'no man's land' where neither custody decree has greater claim to recognition. Consequently, the children are literally 'up for grabs.'

Recent federal and state laws relative to child stealing would not apply to a parent spiriting ones children from this no man's land to the state where that parent exercises legal custody. In order to retain ones custodial rights, the parent not in possession of the children must forego visitation and await the moment the children cross state lines.

A nation state which continues to permit the existence of two conflicting custody decrees regarding the same children violates human rights by not providing elementary legal protection to the family.[12]

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[12] See Universal Declaration of Human Rights, Article 16, paragraph 3, United Nations (1948).

CONCLUSION

The question presented in this appeal is no less substantial or less urgent than the one which required resolution in *Williams* v. *North Carolina, supra.*

For the reasons stated, probable jurisdiction should be noted.

Dated: May 8, 1981.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2117-79

SHARON E. BEN-LEVI,

Plaintiff-Respondent,

v.

MICHAEL BEN-LEVI,

Defendant-Appellant.

Submitted: October 27, 1980 - decided: November 17, 1980.
Before Judges Bischoff, Milmed and Francis.
On appeal from Superior Court, Chancery Division, Mercer County.
Michael Ben-Levi, appellant, *pro se.*
Theodore Sager Meth, attorney for respondent.

PER CURIAM

This appeal challenges the *parens patriae* jurisdiction of a New Jersey court to modify a California custody decree.

Michael and Sharon Ben-Levi were married in California in 1968. A son, Joseph, was born on July 2, 1969 and a daughter, Rachel, was born on February 10, 1971. The parties separated in March 1973. The Superior Court of California entered an interlocutory judgment of divorce pursuant to a petition filed by Michael. This judgment awarded Sharon custody of the two children with a

detailed schedule of visitation reserved for Michael. The judgment became final on December 7, 1974.

Up until 1978 the custodial arrangements were covered by the interlocutory judgment of August 1974. In 1978 the parties again sought judicial intervention in California and as a result of a hearing on April 26, 1978 the court ordered the following: a new visitation schedule, an evaluation of Sharon, Michael and the two children at the U.C.L.A. Neuro-Psychiatric Institute, a hearing upon receipt of the U.C.L.A. report, and continued custody of the children with the mother.

After numerous visits by the Ben-Levis to the Neuro-Psychiatric Institute the California court issued its final order of custody:

> I) Legal custody of the minor children, JOSEPH MOSHE BEN-LEVI, born July 2, 1969 and RACHEL BEN-LEVI, born February 10, 1971, is awarded to each petitioner and respondent in alternate years as follows: [petitioner is Michael Ben-Levi; respondent is Sharon Ben-Levi.]
>
> A. Beginning on July 28, 1978 and continuing until the end of the spring school semester in mid-June, 1979, legal custody is awarded solely to respondent.
>
> B. Legal custody of the minor children is awarded solely to petitioner from the end of the spring school semester in 1979 to the end of the spring school semester, 1980. Thereafter, legal custody of the minor children is to alternate between respondent and petitioner on an annual basis from the end of the spring semester to the end of the spring semester of the following year.

2) Reasonable rights of visitation are reserved to the petitioner or respondent during the year the other has the legal custody of the minor children.

A. The sole cost of visitation is to be borne by party [sic] exercising his or her right of reasonable visitation.

3) The cost of transporting the minor children annually to the custodial parent is to be borne solely by the party receiving the minor children for the ensuring year.

4) During the year that each petitioner or respondent has the legal custody of the minor children, that party is to pay and is responsible for the total support of the minor children.

5) Each petitioner and respondent is to authorize the other to have free access to all medical and school records and to have the right to be in communication with all professional persons who are employed to provide educational and health care for the minor children.

6) Petitioner and respondent are to have the right of reasonable telephone communication with the minor children at all times.

At the time this order was entered the California Court was aware that the minor children would spend their first year in New Jersey.

Sharon and the children came to New Jersey in June 1978 accompanied by one David Wurtzel. Wurtzel and Sharon met each other in March 1973, and they have lived together along with the children since February 1974. Sharon and Wurtzel came to New Jersey to accept high level employment with a computer firm in Prince-

ton. Sharon sought to have both children enrolled in the Chapin School in Princeton. Rachel was admitted but Joseph was not due to what the school characterized as learning problems. The New Grange School, a school that teaches children with learning disabilities, did accept Joseph. The administrative director of the school testified that Joseph had problems in three areas: he had difficulty perceiving other people's reactions to him; he had trouble with his fine motor coordination, *e.g.* writing, and he had trouble with his gross motor coordination, *e.g.*, throwing or catching a ball.

On October 23, 1978, Sharon and Joseph consulted a psychiatrist; these consultations were continued throughout the school year. At trial the psychiatrist gave his initial diagnosis:

> I felt that he was not showing age appropriate development in terms of being comfortable with his own feelings, nor was he comforable in his relations with others. He had difficulty understanding the other person's role in a relationship and he was unable to trust a person in a normal way and his feelings were of such an extreme disruptive sort internally that he had to rely on overly rigid mechanisms of controlling them.

The psychiatrist also testified that Joseph's relationship with his father was good.

During the 1978-1979 school year Rachel did well at the Chapin School and got along fine with her peers. The mistress of the school testified that Rachel learned to relax and became less intense. It was also brought out that a change of schools would not affect Rachel academically but might bring back the intensity and nervousness she had when she first came to Chapin. Joseph also pro-

gressed during the year. His writing improved and he came to trust his teachers. Dr. Permesly, Joseph's psychiatrist, testified that he noticed improvement in Joseph, he had more interaction with other people. He also stated that a change in psychiatrists might induce temporary rejection and depression in Joseph.

On April 27, 1979 Sharon filed a complaint for sole custody in the Superior Court, Chancery Division, Mercer County. She asserted that the children should not be uprooted and sent to California, and as relief she requested:

> A. This Court adjudicate future custody of the minor children of the dissolved marriage between the parties;
>
> B. Make such orders regarding discovery and protection as in the premises may be necessary and just;
>
> C. Make appropriate orders as will be in the best interests of the children in regard to defendant's visitation and support of the children.

This complaint and a summons were served on defendant in California on May 14, 1979.

On May 29, 1979 the attorney for Sharon filed a motion for leave to take depositions, returnable June 15, 1979. Michael filed a motion to dismiss on June 12, 1979 for lack of jurisdiction over the person and the subject matter. Both motions were heard before Judge Tams on June 15, 1979. Michael argued that the custody action could not proceed without *in personam* jurisdiction over him and this could not be accomplished by out of state service of process. Judge Tams rejected this argument, saying in part:

> The state *parens patriea* [*sic*] obligation to fulfill is in the Court in which I'm sitting and I must assume that obligation and determine whether the children need the protection of the Court, and whether there are things which may happen to them which will adversely affect their welfare, their well being, and their morals and health.
>
> The Court automatically has jurisdiction to make a determination and to do whatever needs to be done in the best interests of the children with or without the *in personam* service on either one of the parents or both of them. There is no doubt in my mind that if the Court found children without either parent in this state, that they could proceed to do whatever was necessary to protect the welfare of those children.

Sharon's motion to take depositions was also denied and the matter was scheduled for a plenary hearing on June 26, 1979.

On June 4, 1979, before argument on the above motions took place, Michael filed in the Superior Court of California an order to show cause to modify custody. He sought sole and exclusive custody. A hearing was set in California for June 29, 1979.

Prior to the New Jersey custody hearing, Michael filed a motion for a stay so he could perfect an appeal on the question of the propriety of the Chancery Division's invocation of *parens patriae* jurisdiction. This motion was denied because the judge felt it would be in everyone's best interest to hold an early hearing.

The custody hearing was held on June 26, 1979. In addition to the testimony already referred to, it was brought

out that both children had made progress in school and in their social environment while in New Jersey. Furthermore, Dr. Permesly stated that Joseph has already seen too many changes in his life, such as:

> [T]he loss of a father, to the gaining of a new father [Sharon's co-habitant David Wurtzel], to having a therapist and losing a therapist, being in a public school and then going to a private school in California and then coming out here and going to visit different people during that time.

Although Sharon has had continuous custody of the children since she and Michael separated, she did testify that Michael has had extensive visitation with their children both in California and New Jersey. The children did spend six weeks with their father before they came to New Jersey. The children stated they liked their father but would prefer to live with their mother and visit him.

In addition, the children's mother testified that Joseph has developed his first friendship with another boy and he has joined the Cub scouts.

In his oral opinion the judge first noted that Sharon had not deliberately left California to evade the jurisdiction of the court. He further found that the children were happy in New Jersey, had made significant social and academic progress, and that to take them from the custody of their mother would result in negative consequences. The judge, pursuant to his *parens patriae* power, then ordered that custody remain with the mother temporarily pending a report by the probation department on both Sharon and Michael.

Meanwhile, on August 27, 1979 the Superior Court of California continued its hearings as to custody to await

further developments in New Jersey. A final judgment was entered in New Jersey on January 18, 1980 directing the following:

> A. The infant children of the marriage, namely Joseph M. Ben-Levi and Rachel Ben-Levi, shall be and they hereby are placed in the custody of plaintiff until further Order of this Court.
>
> B. Defendant may apply to this Court for reasonable visitation of the said children on notice to plaintiff . . .
>
> C. The Court reserves as to plaintiff's application for child support.

Following entry of this order the Superior Court of California, after a review of the New Jersey proceedings, affirmed its prior joint custody order of July 18, 1978.

Meanwhile, Michael filed a notice of appeal from the New Jersey order on February 15, 1980. He also made application to the Supreme Court of New Jersey for direct certification which was denied on May 28, 1980.

Our review of the entire record in this matter satisfies us that all of the issues of law raised on this appeal are clearly without merit. *R.* 2.11-3(e)(1)(E).

Ten of the twelve grounds upon which Michael relies to invalidate the proceedings in the Chancery Division amount to a fragmented attack on the *parens patriae* jurisdiction of the court. This attack is postulated essentially on the court's lack of *in personam* jurisdiction over him, the result of which it is contended, is violative of his procedural due process.

Without attempting to meet these contentions on a point by point basis in view of the fragmented nature of

the approach, it is sufficient to state that jurisdiction founded on the physical presence of the children within the State under circumstances evident here is sufficient to permit a New Jersey court to intervene. New Jersey does not follow the *in personam* requirement of jurisdiction where the residence of the children within the State's borders is apparent. *E.g., Fantony v. Fantony,* 21 *N.J.* 525 (1956); *Mrowczynski v. Mrowczynski,* 142 *N.J. Super.* 312, 322 (App. Div. 1976).

Jurisdictional doctrines concerning status, such as *parens patriae,* are consistent with procedural due process. See *Shaffer v. Heitner,* 433 *U.S.* 186, 208 n. 30, 97 *S. Ct.* 2569, 2582 n. 30, 53 *L. Ed.* 2d 683 (1977).

Affirmed.

SUPREME COURT OF NEW JERSEY
SEPTEMBER TERM 1980

C - 289

SHARON E. BEN-LEVI,

Plaintiff-Respondent,

v.

MICHAEL BEN-LEVI,

Defendant-Petitioner.

[Filed on February 11, 1981.]

ON PETITION FOR CERTIFICATION

To the Appellate Division Superior Court:

A petition for certification of the judgment in A-2117-79 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of February 1981.

/s/ Stephen W. Townsend
Clerk

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2117-79

SHARON E. BEN-LEVI,

Plaintiff-Respondent,

v.

MICHAEL BEN-LEVI,

Defendant-Appellant.

[Filed on February 27, 1981.]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Michael Ben-Levi, defendant-appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered on November 17, 1980, a hearing on which was denied by the Supreme Court of New Jersey on February 9, 1981.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

Dated: February 20, 1981.

/s/ Michael Ben-Levi
MICHAEL BEN-LEVI
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[Pursuant to Rule 10.3., a copy of this Notice of Appeal was filed with the Office of the Supreme Court of New Jersey.]

TEXT OF THREE NEW JERSEY STATUTES

9:2-1. Custody of children of parents divorced in another state or country; action in Superior Court; notice to persons interested; judgment; exclusion from hearing; records not open to public inspection.

After a divorce adjudged in any other State or country, if minor children of the marriage are inhabitants of this State, the Superior Court, in an action brought by either parent or by a guardian ad litem in behalf of the children, such notice being given to parents as the court shall direct, may make such judgment concerning their care, custody, education and maintenance as if the divorce had been obtained in this State. (The remainder of the statute is not relevant to the appeal.)

2A:34-32. Notice and opportunity to be heard

Before a decree is made pursuant to this act, [Uniform Child Custody Jurisdiction Act] notice and opportunity to be heard shall be given in accordance with the Rules Governing the Courts of the State of New Jersey to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this State, notice and opportunity to be heard shall be given pursuant to section 6 of this act[1]. [[1]Section 2A:34-33.]

2A:34-33. Notice to persons outside this state; submission to jurisdiction

a. Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) By personal delivery outside this State in a manner prescribed for service of process within this State;

(2) In the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(3) By any form of mail addressed to the person to be served; or

(4) As directed by the court.

b. Notice under this section shall be served, mailed, or delivered, at least 20 days before any hearing in this State, or such other time period as directed by the court if the matter is emergent.

c. Proof of service outside this State may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this State, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

d. Notice is not required if a person submits to the jurisdiction of the court.

RESTATEMENT OF THE TWO-PART FEDERAL QUESTION INVOLVED

A. Are the *in rem* rules governing the adjudication of child custody at modification of custody proceedings contained in *N.J.S.A.* 9:2-1, *N.J.S.A.* 2A:34-32, and *N.J.S.A.* 2A:34-33 consistent with the standard of fairness which is required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

B. Given that custody is a right "far more precious . . . than property rights," do the *in rem* requirements contained in *N.J.S.A.* 9:2-1, *N.J.S.A.* 2A:34-32, and *N.J.S.A.* 2A:34-33 constitute unconstitutional discrimination thereby violating the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States by not granting to nonresident defendants at modification of child custody proceedings protection equal to that of nonresident defendants at modification of child support proceedings?

The defendant-petitioner believes that these statutes are repugnant to the Fourteenth Amendment to the Constitution of the United States. Reliance upon them has resulted in an *ex parte* judgment which has had the effect of terminating his right to the continued custody of his children and caused a total cessation of the parent-child relationship. In response to the federal question, the Appellate Division on November 17, 1980 upheld the validity of these statutes. Therefore, the defendant-petitioner appeals to the Supreme Court of New Jersey and seeks the federal protection of the Fourteenth Amendment to the Constitution of the United States.

SUPREME COURT OF NEW JERSEY

STEPHEN W. TOWNSEND
CLERK
DAVID A. LAMPEN
DEPUTY CLERK

March 31, 1981

Re: *Sharon E. Ben-Levi v. Michael Ben-Levi*
18,003

TO WHOM IT MAY CONCERN:

This is to certify that the attached is a true copy of page one of the Reply Brief and Appendix for Petitioner filed by the Office of the Clerk of the Supreme Court of New Jersey on January 14, 1981 in connection with a petition for certification filed by the defendant-petitioner in the above case.

Very truly yours,

/s/ Stephen W. Townsend

SWT:la

SEAL OF THE
SUPREME COURT
OF NEW JERSEY

Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1894

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

MICHAEL BEN-LEVI,

Appellant,

v.

SHARON E. BEN-LEVI,

Appellee.

On Appeal from the Superior Court of
the State of New Jersey, Appellate Division

SUPPLEMENTAL BRIEF FOR APPELLANT

MICHAEL BEN-LEVI
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CONSTITUTION

Constitution of the United States:

Article IV, §1, Full Faith and Credit Clause. 2

STATUTES AND ACTS

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Strumberg, George W. *The Status of Children in the Conflict of Laws.* University of Chicago Law Review 8:42-62 (December 1940). 3

THE RECENT ENACTMENT OF 28 U.S.C. §1738A DOES NOT MAKE THE APPEAL MOOT

Subsequent to the filing of the Jurisdictional Statement on May 8, 1981, the Appellant became aware of new federal legislation which is relevant to the central issue presented in that statement. Public Law No. 96-611, §8.(a), which became law on December 28, 1980, amended Chapter 115 of Title 28, United States Code "by adding immediately after section 1738 the following new section: ' **§1738A. Full faith and credit given to child custody determinations.**'"

Under the sub-heading "FINDING AND PURPOSES," Congress enumerated the following factors which led it to amend that section of the United States Code:

> "(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States, . . . ;
>
> "(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, **are often inconsistent and conflicting**;
>
> "(3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment and interstate transportation of children, the

disregard of court orders, excessive relitigation of cases, **obtaining of conflicting orders by the courts of various jurisdictions,** . . . ; and

"(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, ..." Public L. No. 96-611, §7.(a), 94 Stat. 3568-3569 (1980). [Emphasis added.]

A major objective of amending the United States Code was to avoid and eliminate the possibility of future inconsistent and conflicting custody decrees. Due to the fact this is a central issue in the appeal, one might conclude that this legislation has now made the appeal moot. On the contrary, the reverse is true. In this Supplemental Brief the Appellant will argue that the objective of the legislation cannot be achieved unless this Court rules on the federal question presented in the Jurisdictional Statement.

A. A requirement that full faith and credit be given a child custody determination does not deter a second forum state from modifying a foreign custody decree.

Article IV, §1 of the Constitution of the United States requires each State to grant full faith and credit to the judicial proceedings of another State. Courts, however, have held that the Full Faith and Credit Clause of the Constitution is not applicable to custody decrees.

"It is well-established that the Full Faith and Credit Clause of the United States Constitution is not applicable to custody decrees, which are uniformly held to be subject to modification." *Nehra* v. *Uhlar*, 168 N.J. Super. 187, 193, 402 A. 2d 264,

267 (App. Div. 1979).

In *Borys* v. *Borys*, 76 N.J. 103, 120, 386 A. 2d 366, 374 (Sup. Ct. 1978), the Supreme Court of New Jersey endorsed a view "[e]xcepting child custody decrees from full faith and credit." The *Borys* Court, however, recognized that the controversy is academic because "full faith and credit does not preclude modification of a custody decree by the forum state on grounds permitted by the law of the rendering state, *Halvey*, [*Halvey* v. *Halvey*, 330 U.S. 610 (1947).] *supra.*" *Borys*, 76 N.J. at 115, 386 A. 2d at 372.

All states recognize changed circumstances as the basis for modifying a custody decree. Therefore

> " . . . the forum can modify the decree based on a finding that circumstances have changed since the decree was entered.
>
> [T]he term "change in conditions" is sufficiently broad to make it possible for a court to escape what it might otherwise feel to be an obligation to recognize an earlier award * * * through resort to the simple expedient of requiring little evidence of change. [*Strumberg, The Status of Children in the Conflict of Laws*, 8 *U. Chi. L. Rev.* 42, 57 (1940).]" *Borys*, 76 N.J. at 116, 386 A. 2d at 372-373.

The American Law Reports, Annotated also made the following candid observation:

> "Generally where a court of a state is passing upon its own jurisdiction to award custody of a child that is physically present, though domiciled elsewhere, it is likely to be motivated by the doctrine of parens patriae and to proceed to decide for

> itself what is for the best interests of the child, and if there is in existence a valid judgment of another state awarding such custody, **to give at least lip service to the binding effect thereof by limiting the court's consideration of the merits to conditions which have changed since that foreign judgment was rendered** -- all too frequently such changed conditions being found to exist in favor of the local citizen." Dempsey, Custody of Child - Jurisdiction, 4 A.L.R. 2d 15 (1949). [Emphasis added.]

In sum, where a child is present within the jurisdiction of a second forum state, a requirement that full faith and credit be given a child custody determination does not deter the courts of that state from modifying a foreign custody decree. In the event the second forum state exercises personal jurisdiction over the defendant at the modification proceedings, the requirement of full faith and credit merely deprives the court of original jurisdiction of continuing jurisdiction.

B. The jurisdictional requirements of 28 U.S.C. § 1738A do not preclude the existence of two, equally valid, inconsistent and conflicting custody decrees.

The jurisdictional requirements of 28 U.S.C. §1738A are similar, but not identical to those of the Uniform Child Custody Jurisdiction Act. In the event a child resides temporarily in a second forum state for more than six months, that state could lay claim to being the home state of the child. Any controversy regarding which state rightfully exercises jurisdiction is decided by the second forum state. If the modification proceedings in the second forum state are *in personam*, a judgment rendered by that court is *res judicata* and supersedes the original decree.

Following the lead of the Uniform Child Custody Jurisdiction Act, 28 U.S.C. §1738A does not require personal jurisdiction over a nonresident defendant at modification proceedings. Consequently, if the modification of custody proceedings in the second forum state are *in rem*, and that court renders an *ex parte* modification of custody judgment, as in the instant case, the court of original jurisdiction is not required to accord it full faith and credit. *May* v. *Anderson*, 345 U.S. 528 (1953); *Borys*, 76 N.J. at 115, 386 A. 2d at 372.

Despite the efforts of Congress to eliminate inconsistent and conflicting custody decrees, the *in rem* jurisdictional requirements of 28 U.S.C. §1738A at modification of custody proceedings preclude this from occurring. Inconsistent and conflicting custody decrees will continue to exist as long as a second forum state can lawfully modify a foreign custody decree without exercising personal jurisdiction over a nonresident defendant, and the court of original jurisdiction can lawfully deny full faith and credit to an *ex parte* modification of custody judgment rendered by a second forum state not exercising *in personam* jurisdiction. **A definitive ruling on the federal question contained in the Jurisdictional Statement will once and for all resolve this legal dilemma.**

C. Inconsistent and conflicting custody decrees violate the civil and human rights of the minor children and parents caught up in this legal tragedy.

It is highly significant that the Appellee did not file a Motion to Dismiss. In the event this Court denies probable jurisdiction, a stalemate will occur which will pose a serious threat to family stability. It should be

noted that the California Order reaffirming the Joint Custody Order was rendered **after** the New Jersey *ex parte* modification and with full knowledge of the New Jersey proceedings. Consequently, neither custody decree commands greater recognition in jurisdictions outside of California and New Jersey.

Therefore, the minor children become hostages in an interstate jurisdictional dispute. They are virtual prisoners within the State of New Jersey because no law would be violated in the event they are spirited to California while visiting outside the boundaries of New Jersey. Moreover, this conflict of laws has resulted in a total breakdown in the father-children relationship due to the fact that visitation and contact with the children in New Jersey would subject the Appellant to the jurisdiction of that state and the subsequent loss of custodial rights under the California Joint Custody Order.

The continuation of this stalemate is not in the best interests of the minor children or either parent. The non resolution of this dilemma constitutes a violation of human rights by not providing elementary legal protection to the family. Violations of human rights take on a legal and political significance that transcend the boundaries of the nation-state in which they occur.

Dated: June 22, 1981.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
AUG 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1894

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

MICHAEL BEN-LEVI,

Appellant,

v.

SHARON E. BEN-LEVI,

Appellee.

On Appeal from the Superior Court of
the State of New Jersey, Appellate Division

SECOND SUPPLEMENTAL BRIEF FOR APPELLANT

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TABLE OF AUTHORITIES CITED

CASES

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264 Ga. 24, 268 S.E. 2d 648 (Sup. Ct. 1980). 1

Kulko v. *Superior Court of California*,
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May v. *Anderson*,
345 U.S. 528 (1953). 1, 2

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(Sup. Ct. 1980). 1

CONSTITUTION

Constitution of the United States:

Article IV, §1, Full Faith and Credit Clause. 1

Fourteenth Amendment. 2

Section 1, Due Process Clause. 1

RULES

Supreme Court of the United States:

Rule 17. 1

STATUTES AND ACTS

Uniform Child Custody
Jurisdiction Act (1968). 2

When a state court of last resort has decided a federal question in a way which is in conflict with the decision of another state court of last resort, Rule 17.1.(b) of this Court indicates that a contradiction of this type warrants special consideration for review. The existence of such a conflict has now come to the attention of the Appellant; therefore, he wishes to apprise the Court of this fact.

On June 11, 1980 the Supreme Court of Georgia ruled in *Goldfarb* v. *Goldfarb*, 264 Ga. 24, 268 S.E. 2d 648 (Sup. Ct. 1980) that the due process rights of a nonresident defendant parent are not violated "when, with full notice, a foreign state adjudicates his right to the custody of his children without personal jurisdiction over him." 246 Ga. at 26, 268 S.E. 2d at 650. In the instant case the Superior Court of New Jersey, Appellate Division expressed a similar view on November 17, 1980 in its Per Curiam.

On July 9, 1980, four weeks after the Georgia decision, Ohio reached the opposite conclusion. In *Pasqualone* v. *Pasqualone*, 63 Ohio St. 2d 96, 406 N.E. 2d 1121 (Sup. Ct. 1980) the Supreme Court of Ohio held that "[i]n a custody case . . . as in a child support or alimony case, it is not fair and reasonable to allow one party to bind the other party on the basis of his unilateral acts. . . . In this sense, *May* [v. *Anderson*, 345 U.S. 528 (1953)], in requiring jurisdiction over the person, survives today as good law." 63 Ohio St. 2d at 103, 406 N.E. 2d at 1127. The Court concluded that it is not bound by an out-of-state custody decree under the Full Faith and Credit Clause unless that state "has jurisdiction over the person of the . . . [nonresident] party involved sufficient under the Due Process Clause." 63 Ohio St. 2d at 96-97, 406 N.E. 2d at 1123.

The Supreme Court of Georgia and of Ohio reached conflicting decisions regarding the same federal question. Under review in both states were the jurisdictional requirements of Section 3 of the Uniform Child Custody Jurisdiction Act which grants jurisdiction to a forum state if a child has resided in that state for a minimum of six months. Personal jurisdiction over a nonresident defendant parent is not required by the Act at either initial or modification of custody proceedings. In reaching its respective conclusion, each court considered *May* v. *Anderson, supra,* and *Kulko* v. *Superior Court of California,* 436 U.S. 84 (1978). The parties in neither case sought review by this Court.

It is impermissible that there exist in the United States two opposing standards of justice relative to the constitutional right of a defendant to procedural due process of law under the Fourteenth Amendment to the Constitution of the United States. This is particularly so when the lives of minor children are adversely affected by this uncertainty. The instant case provides this Court with an opportunity to resolve this serious conflict.

Dated: August 28, 1981.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
AUG 18 1981
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No. 80-1894

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

MICHAEL BEN-LEVI,

Appellant,

v.

SHARON E. BEN-LEVI,

Appellee.

On Appeal from the Superior Court of the State of New Jersey, Appellate Division

MOTION TO DISMISS

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No. 80-1894

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

MICHAEL BEN-LEVI,

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Appellee.

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---

MOTION TO DISMISS

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September 30, 1981

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1980

NO. 80-1894

MICHAEL BEN-LEVI,

Appellant,

v.

SHARON E. BEN-LEVI,

Appellee.

MOTION TO DISMISS

I have been directed by this Court to respond to Mr. Ben-Levi's jurisdictional statement. This response complies with that direction and is submitted only out of respect for this Court.

I move that this case be denied a hearing by the United States Supreme Court on the grounds that it does not contain any clear federal issue and that the judgment of the Appellate Division of the New Jersey Superior Court rests on independent and adequate state grounds. Please consider the following:

1. The Superior Court of New Jersey assumed jurisdiction over the children in June 1979. They had been residing in New Jersey for nearly one year and this fact has never been contested. The Superior Court of New Jersey found that I "had not deliberately left California to evade the jurisdiction of the [California] Court".

2. New Jersey law traditionally requires jurisdiction over the children, not the parents, to make orders in the childrens' best interest. Children are not property of the parents, but have their own rights to be protected.

3. The Appellate Court of New Jersey upheld the action of the Trial Court stating about Mr. Ben-Levi's appeal that:

> "Our review of the entire record in this matter satisfies us that all of the issues of law raised on this appeal are clearly without merit."

4. The Appellate Division of New Jersey refused to rehear the case.

5. Twice the Supreme Court of New Jersey refused to hear the case.

6. No part of the decision of any of the Courts of New Jersey rested upon any federal statute and no part constituted the enforcement of any provision of the United States Constitution.

Throughout the masses of material Mr. Ben-Levi has generated, he maintains that New Jersey must have jurisdiction by personal service in New Jersey over him not the children, in order to modify a custody order. As Mr. Ben-Levi said in his brief for Certification to the New Jersey Supreme Court:

> "To set the record straight, this appeal does not challenge the parens patriae jurisdiction of New Jersey courts, as parens patriae jurisdiction is operationally and legally defined by N.J.S.A. 2A 34-31b and 2A:34-31(3), and N.J.S.A. 9:2-9...This appeal is limited in its scope. It merely challenges the adequacy of in rem jurisdiction at modification of

custody proceedings when child abuse or neglect has not been alleged."

The children are not a rem or a property right. Their best interests are at stake and any lesser standard is child abuse or neglect. The Appellate Division of New Jersey clearly found that "jurisdiction founded on the physical presence of the children within the State under circumstances evident here is sufficient to permit a New Jersey court to intervene".

Mr. Ben-Levi tries to create as a ground for your hearing this case a "conflict" between New Jersey and California. None exists. The California Court, obviously in an attempt to mollify Mr. Ben-Levi, entered an empty order reconfirming its 1978 order. Since the children and I were living in New Jersey and had already had a full hearing before the New Jersey Court, we did not participate in or challenge the action of the California court. To equate the two orders so as to claim an unconstitutional and impermissible "conflict" between the two States is a logical and legal absurdity and an imposition on this Court.

Mr. Ben-Levi is unemployed and devotes a great deal of time to this case. He came to New Jersey twice to appear before the court to argue his concepts of jurisdiction, but not to see his children. Neither I nor the New Jersey courts has ever denied him visitation or contact with the children; in fact in 1978 he visited them extensively in New Jersey. It is his obsession with his jurisdictional issue which causes him voluntarily to suspend contact with the children.

On the other hand, I work to support the children; I receive no child support and have not since 1977; nor has any been ordered by New Jersey. While I am reluctant to act pro

se, I am also finding it difficult and wasteful to continue paying attorneys to debate with Mr. Ben-Levi. He continues to use and abuse the legal system to get to me.

I respectfully request that this Court dismiss Mr. Ben-Levi's notice of appeal since it does not involve a substantial federal question.

Respectfully submitted,

Sharon E. Ben-Levi

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Motion to Dismiss was mailed to MICHAEL BEN-LEVI, Appellant, pro se, 327 North Curson Avenue, Los Angeles, California 90036 this first day of October, 1981.

Sharon E. Ben-Levi

SHARON E. BEN-LEVI
Appellee, pro se

Office-Supreme Court, U.S.
FILED
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CLERK

No. 80-1894

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OCTOBER TERM 1980

MICHAEL BEN-LEVI,

Appellant,

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SHARON E. BEN-LEVI,

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REPLY BRIEF FOR APPELLANT

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(213) 933-0254

TABLE OF AUTHORITIES CITED

CASES

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334 U.S. 541 (1948). 4

Halvey v. *Halvey*,
330 U.S. 610 (1947). 4

May v. *Anderson*,
345 U.S. 528 (1953). 4, 5

CONSTITUTION

Constitution of the United States:

Article IV, §1, Full Faith and Credit Clause. 5

Fourteenth Amendment. 2

RULES

Supreme Court of the United States:

Rule 16. 1

STATUTES AND ACTS

Public Law No. 96-611,
94 Stat. 3566 (1980). 3

Uniform Child Custody
Jurisdiction Act (1968). 4

On May 8, 1981 the Appellant filed with this Court a Jurisdictional Statement. The Appellee did not exercise her prerogative under Rule 16 to file an optional response within the prescribed thirty day period.

Two months after the filing of the Jurisdictional Statement, the Clerk of this Court informed the attorney for the Appellee that the Court had requested the filing of a response on or before August 7, 1981. In his letter, the Clerk stated that the "response in appeals normally takes the form of a motion to dismiss or affirm, as provided for in Rule 16 of the rules of this Court."

Though the Appellee did not file a formal response in compliance with the request of this Court, her attorney stated in a letter to the Clerk dated July 17, 1981 that his client had declined to respond because she felt the case did not have those merits which would cause this Court to grant review.

This brief is in reply to the view of the Appellee that the appeal lacks merit. It will also present an analysis of Rule 16. This analysis questions the logical adequacy of its provisions which permit an Appellee to file only a motion to dimiss or affirm.

The provisions of Rule 16.1. are based on a traditional adversary model which automatically assumes that a motion to dismiss an appeal or a motion to affirm the judgment below are the only two responses which serve the best interests of an Appellee. This may not be true in cases involving diversity of citizenship and a conflict of laws between states. In such cases, the maintenance of the *status quo* may continue a stalemate between judgments of two states which are inconsistent and conflicting. The continuation of this legal stalemate

may not serve the best interests of either party. Therefore, rather than a motion to dismiss, it is possible that the best interests of an Appellee, and the interests of justice in general would be better served by an Appellee filing a motion to review the case so that the stalemate and interstate conflict be resolved.

Due to factors inherent in our federal system, state courts of review and this Court are not isomorphic. In cases involving diversity of citizenship and a conflict of laws between states, a federal question may be viewed by this Court with a perspective and under circumstances which could not be present at the time the same federal question was before the courts of a state.

In the instant case the Appellant filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division on February 15, 1980. This Notice of Appeal challenged the constitutionality of three New Jersey statutes whose jurisdictional rules governing the modification of a foreign child custody decree permit their courts without any requirement of a defendant-forum nexus to adjudicate and terminate the custodial rights of a nonresident defendant parent granted under a foreign judgment. The federal question presented in the appeal asked whether the jurisdictional rules contained in those statutes violate the Fourteenth Amendment to the Constitution of the United States by denying procedural due process of law in cases where a forum state does not exercise personal jurisdiction over a nonresident defendant.

Due to the fact the Appellant had virtually no prior contact with the State of New Jersey, the Superior Court of New Jersey invoked *parens patriae* jurisdiction. Consequently, the *ex parte* modification of custody decree which it issued did not automatically

supersede the prior California judgment. At the time the Notice of Appeal was filed and the Brief and Appendix for Appellant reproduced, it was not known whether the Superior Court of California would grant recognition to the New Jersey modification.

Subsequently, the Superior Court of California did not accord full faith and credit to the New Jersey *ex parte* modification, and it reaffirmed its prior judgment. All doubt was thereby eliminated. There now exist two, equally valid, inconsistent and conflicting custody decrees relative to the same children. This emergent factor has added another dimension to the federal question.

When the federal question was before the New Jersey courts, it merely involved an issue of due process relative to the Appellant. The same federal question before this Court now involves an additional issue, a conflict of laws which violates the human rights of the minor children caught between inconsistent and conflicting child custody decrees. Neither custody decree commands greater recognition in other jurisdictions. Therefore, until this conflict is resolved, no law is violated in the event the Ben-Levi children are seized by their father and spirited back to California when they cross New Jersey state lines. The minor children are also subject to being seized by their mother and spirited to New Jersey should they be brought to California and later venture from that state. This legal nightmare must end. Minor children have a constitutional right to the legal protection afforded by one, universally recognized custody decree.

Recognition of this fundamental human right led Congress to enact Public Law 96-611. This statute enacted into federal law the major provisions of the

Uniform Child Custody Jurisdiction Act. One of the stated purposes of that public law is to eliminate inconsistent and conflicting child custody decrees. The jurisdictional requirements of this new legislation and the Uniform Child Custody Jurisdiction Act greatly reduce forum shoppping, but they do not preclude the existence of inconsistent and conflicting custody decrees. Indicative of this is the fact that in the instant case the provisions of the Uniform Child Custody Jurisdiction Act were in effect in each state at the time each respective custody judgment was issued and entered.

It is axiomatic that the process of correctly identifying the source of a problem must precede an effective proposal for its remedy. There is insufficient recognition of the fact that inconsistent and conflicting child custody decrees are the unanticipated and unintended consequences of a constitutional issue which was raised but left unresolved in the *May* v. *Anderson* decision of 1953. 345 U.S. 528.

Child custody decrees have been uniformly held to be subject to modification. A court of competent jurisdiction has the right to modify a custody decree of another state on grounds permitted by the laws of the rendering state. *Halvey* v. *Halvey*, 330 U.S. 610 (1947). Therefore, a judgment modifying an out-of-state custody decree which is rendered by a court of competent jurisdiction supersedes the original decree.

In *May* v. *Anderson, supra,* the Court took under review the proper basis for state-court jurisdiction at custody proceedings. Using *Estin* v. *Estin,* 334 U.S. 541 (1948) as the model, the Opinion of the Court held that without exercising personal jurisdiction over a nonresident parent, a court could not deprive that parent of custody.

That Opinion draws in question the jurisdictional adequacy of *in rem* custody proceedings. On the assumption that the Full Faith and Credit Clause of the Constitution does not require recognition of a judgment rendered by a court with a jurisdictional defect, the Opinion of the Court in *May* concluded that sister states are not required to accord full faith and credit to an *ex parte* custody judgment.

Only a plurality of Justices held that view. In a concurring opinion, Justice Frankfurter merely endorsed the conclusion. This created a majority rule that a sister state is not required to recognize an out-of-state *ex parte* custody decree. It should be noted in *May* that it was the initial award of custody which was *ex parte*, and the second forum state exercised personal jurisdiction over both parents. Therefore, the modification rendered by the second forum state superseded the original decree.

Two, equally valid, inconsistent and conflicting custody decrees are the unanticipated and unintended consequences of the *May* decision. This occurs when an *ex parte* custody decree is issued by a second forum state at modification proceedings, and the court of original jurisdiction refuses to accord that judgment full faith and credit. The *May* decision has it both ways. A second forum state can assume *in rem* jurisdiction and issue an *ex parte* modification of custody decree, and the state which rendered the initial decree is allowed to deny recognition to that modification.

There is an urgent need to resolve this anomaly which has created tragedy and trauma in the lives of countless children. The instant case provides this Court with a rare opportunity to rule on the unanswered federal question responsible for this legal dilemma.

If *in rem* jurisdictional rules at modification of custody proceedings are consistent with due process of law, then the court of original jurisdiction has no basis in law for denying full faith and credit to an *ex parte* modification of custody decree. On the other hand, if *in rem* jurisdictional rules governing the modification of custody are not consistent with procedural due process of law, then a forum state not exercising personal jurisdiction over a nonresident defendant parent should be denied jurisdiction to modify an out-of-state decree unless the plaintiff can append to the complaint an order rendered by the forum of the defendant declaring that the best interests of the child(ren) call for the forum of the plaintiff to assume jurisdiction. Which ever way this Court rules, one and only one custody decree will be valid at any given time.

The case load of this Court is limited; therefore, only the most substantial federal questions can be taken under submission. The issue of inconsistent and conflicting child custody decrees is a new American tragedy which cries out for resolution. Indication of this sentiment is the unanimous support for the resolution of this problem shown by the broad spectrum of the Southern California religious community. Messages urging this Court to note probable jurisdiction are being sent.

Dated: August 19, 1981.

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No. 80-1894

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MICHAEL BEN-LEVI,

Appellant,

v.

SHARON E. BEN-LEVI,

Appellee.

On Appeal from the Superior Court of
the State of New Jersey, Appellate Division

BRIEF FOR APPELLANT IN OPPOSITION TO THE MOTION TO DISMISS

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In response to the Jurisdictional Statement filed on May 8, 1981, the Appellee submitted a Motion to Dismiss dated September 30, 1981. The Appellee states on page 2 of her motion that the appeal "does not contain any clear federal issue." At the conclusion of her motion on page 5, Appellee also maintains that the appeal "does not involve a substantial federal question."

THE FEDERAL QUESTION IS CLEAR AND WAS RAISED AT EVERY STAGE

In his Notice of Motion to Dismiss - Lack of Jurisdiction Over the Person filed with the Superior Court of New Jersey on June 12, 1979,[1] the Appellant cited *May* v. *Anderson*, 345 U.S. 528, 533 (1953) in maintaining that a forum state cannot deprive a nonresident defendant parent of his right to custody without exercising *in personam* jurisdiction. See annexed Memorandum of Points and Authorities, page 4, lines 7-14. The Appellant then sought the protection of the Federal Constitution by relying on *Kulko* v. *Superior Court of California*, 436 U.S. 84, 91 (1978) in stating that [t]he Due Process Clause of the Fourteenth Amendment [United States Constitution] operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants."[2] Page 5, lines 13-17. Lacking minimum contact with the state of the forum, the Appellant maintained that he

[1]At the request of the Appellant, a certified copy of all documents from the record mentioned in this brief was sent under seal to the Clerk of this Court by the Clerk of the Supreme Court of New Jersey.

[2]The Appellant purposely included in the original document filed with the Superior Court of New Jersey the words 'United States Constitution' in brackets to emphasize that he was seeking the protection of the Federal Constitution and laying the basis for the raising of a federal question.

"ought not be required to defend himself in the State of New Jersey." Page 6, lines 27-28.

These identical points were again raised by the Appellant in his Notice for Stay of Judgment filed on June 18, 1979. See the second page of the Certification annexed to the Notice for Stay, lines 3-8, and 13-17.

In his Notice of Appeal to the Superior Court of New Jersey, Appellate Division filed on February 15, 1980, the Appellant drew into question the validity of N.J.S.A. 9:2-1, N.J.S.A. 2A:34-32, and N.J.S.A. 2A:34-33. Page 4, lines 2-19. The latter two statutes contain the procedural due process of law requirements of the Uniform Child Custody Jurisdiction Act (UCCJA). The constitutionality of those statutes was challenged on the basis of specific reference to the Due Process Clause of the Fourteenth Amendment to the Constitution, and by citing both *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) and *Kulko, supra.* Page 3, lines 20-28.

On November 17, 1980 the Appellate Division issued a Per Curiam which states that the "[j]urisdictional doctrines concerning status," contained in those statutes "are consistent with procedural due process. See *Shaffer* v. *Heitner*, 433 *U.S.* 186, 208 n. 30, 97 *S.Ct.* 2569, 2582 n. 30, 53 *L. Ed.* 2d 683 (1977)." Page 9, lines 9-12. The Appellate Division not only responded to the federal question, but relied upon the Federal Constitution by citing *Shaffer* v. *Heitner, supra,* as authority.

In his Petition for Certification to the Supreme Court of New Jersey, the Appellant formally presented a two-part federal question which is almost identical to the one contained in the Jurisdictional Statement. See page 1 of the Reply Brief filed on January 14, 1981.

Due to the fact the judgment rendered by the Superior Court of New Jersey, Appellate Division upheld the constitutionality of state statutes whose validity under the Federal Constitution was clearly drawn in question, the Appellant is fully justified in seeking review on appeal by invoking subparagraph (2) of Title 28 of the United States Code, Section 1257.

THE FEDERAL QUESTION IS VERY SUBSTANTIAL

Altogether, this Court agreed to review the federal question in five family law cases which involved child custody.[3] In each case the federal question asked whether the state of the forum is required by Article IV, §1 of the United States Constitution to grant full faith and credit to the custody decree of a sister state.

Those who had hoped that the Full Faith and Credit Clause would be used as the means to prohibit or limit a court of competent jurisdiction from modifying an out-of-state custody decree were disappointed by *Halvey, supra.*[4] There is consensus that a "custody decree [is] not irrevocable and unchangeable," *Halvey, supra,* at 612. Consequently, there was no basis upon which the

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[3] *Halvey* v. *Halvey*, 330 U.S. 610 (1947); *May* v. *Anderson*, 345 U.S. 528 (1953); *Kovacs* v *Brewer*, 356 U.S. 604 (1958); *Ford* v. *Ford*, 371 U.S. 187 (1962); and *Webb* v. *Webb*, No. 79-6853 (1981). The defect in *Webb, supra,* is not that this Court found the federal question less substantial than originally thought, but that it was not properly raised in the state courts.

[4] See Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modification*, 65 Cal. L. Rev. 978, 981 n. 21 (1977).

Halvey Court could deny a court of competent jurisdiction the right to modify an out-of-state decree on grounds permitted by the rendering state.

The second custody case to be reviewed by this Court considered the question whether in the absence of personal jurisdiction, an *ex parte* custody decree rendered by one state had any binding effect upon the absent parent or required the granting of full faith and credit by another state. The plurality opinion in *May* v. *Anderson, supra,* relied on *Estin* v. *Estin,* 334 U.S. 541 (1948). However, the rule that emerged from *May* was foreshadowed by *Halvey, supra,* at 614.

> "If the court of the State which rendered the judgment had no jurisdiction over the person or the subject matter, the jurisdictional infirmity is not saved by the Full Faith and Credit Clause."

The opinions rendered in *Kovacs* v. *Brewer, supra,* and *Ford* v. *Ford, supra,* followed the *Halevy-May* approach. These decisions were a further disappointment to those who felt that these two cases "presented an opportunity for the Supreme Court to bar foreign custody relitigation through the doctrine of full faith and credit."[5] Belatedly, an awareness emerged that the Full Faith and Credit Clause is not a remedy for interstate custody disputes.

The fruit of this awareness was the drafting of the Uniform Child Custody Jurisdiction Act and its adoption into state law by the legislatures of almost all states. The provisions of the Act are designed to prevent concurrent jurisdiction. However, "current judicial interpretations of the UCCJA has not ensured

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[5]Sanders, *Prevention of Child Stealing: The Need for a National Policy,* 11 Loy. L.A. L. Rev. 829, 837 (1978).

single-state jurisdiction in custody cases."[6]

This point was dramatically evident in *Webb,* v. *Webb, supra,* where the interpretation of the jurisdictional provisions of the UCCJA led the courts of Florida and Georgia to each claim jurisdiction and render contradictory decrees. For the most part, arguments regarding whether Georgia, the state of the forum and court of original jurisdiction, was required to grant full faith and credit to the Florida modification centered on which state had correctly interpreted the Uniform Act. As Justice White suggested, "[t]his is purely a question of state law not properly subject to review in this Court." *Webb, supra,* at 2 n. 1 (slip opinion).

The only argument in *Webb* based on a federal issue was raised by the respondent. He asserted that Florida did not exercise jurisdiction over his person. Citing *May* v. *Anderson, supra,* he implied that Georgia was therefore not required to accord the Florida decree full faith and credit. See Brief of Respondent, at 22-23.

The constitutional issue raised in this appeal represents the single most substantial, reoccurring, and unresolved federal question in the area of American family law. **It is one which only this Court can resolve.**

> "The controversy over the *Shaffer* status exception statement will be settled only by further clarification from the United States Supreme Court." Notes, *Pasqualone v. Pasqualone: Interstate Child Custody Tug-of-War Continues,* 10 Cap. U. L. Rev. 343, 357 (1980).

Not only was the question of personal jurisdiction the

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[6] *Id.,* at 835.

sole federal issue raised in *Webb*, but it constitued the federal question in three recent state court decisions. *Goldfarb* v. *Goldfarb*, 264 Ga. 24, 268 S.E. 2d 648 (Sup. Ct. 1980); *Pasqualone* v. *Pasqualone*, 63 Ohio St. 2d 96, 406 N.E. 2d 1121 (Sup. Ct. 1980); and *In re the Marriage of Leonard*, 112 Cal. App. 3d 430, 175 Cal. Rptr. 903 (1st Dist. 1981).

The Appellant already pointed out in his Second Supplemental Brief that the Supreme Court of Georgia and of Ohio reached opposing and conflicting decisions on the issue. Again, only this Court can resolve a conflict between the decision of the court of last resort in one state and the decision of another state court of last resort. As one commentator noted:

> "Just as it may have appeared to the proponents of the UCCJA that passage in all fifty states might be possible and that *May v. Anderson* had settled forever in a quiet grave, *Pasqualone* appeared in Ohio and *May* was resurrected." Notes, 350-351.

In *Webb, supra*, the National Conference of Commissioners on Uniform State Laws (NCCUSL) filed an Amicus Brief on behalf of the respondent. The brief stated that even though the Florida decree is not entitled to full faith and credit in Georgia, it should not be denied full faith and credit because Florida lacked personal jurisdiction over the respondent. *Id.*, at 18. In its amicus brief, the NCCUSL called upon this Court to "reject, as finally overruled, the case of *May* v. *Anderson*," *Id.*, at 4.

It is unfortunate that the NCCUSL perceives of *May* as a threat which would undermine the objectives of the UCCJA. According to the NCCUSL, Section 14 of the UCCJA may be the most critical section in the

entire Act. Its purpose is to limit the modification of a decree and to protect jurisdiction in the initial forum. *Id.*, at 7. Though the NCCUSL favors the continuing jurisdiction of the initial state over a second state that could claim jurisdiction as the home state, the Act grants to the new home state the sole prerogative to make that determination.

The constitutional requirement that a forum state exercise personal jurisdiction over a nonresident defendant before it can render a judgment affecting his rights and interests acts as a countervailing factor in balancing the interests of the child, parents, and forum states. The Appellant proposed in the Jurisdictional Statement that if the new home state does not exercise personal jurisdiction over a nonresident parent who continues to reside in the decree rendering state, jurisdiction to modify a custody decree would pass to the new home state only if the forum of the defendant determines that it would be in the best interests of the child.[7]

This formula provides that the choice of forums will be based on the best interests of the child. It protects the prerogatives of the state exercising continuing jurisdiction. Moreover, it conforms to the minimum contact standard because it ensures a defendant-forum nexus at proceedings where the choice of forums will be litigated.

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[7]This approach, which favors the forum state of original jurisdiction, is not only in keeping with the position of the NCCUSL which seeks to protect the continuing jurisdiction of the initial forum, but is also consistent with this Court's view in *Kulko, supra.* "Finally, basic considerations of fairness point decisively in favor of the appellant's State of domicile as the proper forum for adjudication of this case, whatever the merits of appellee's underlying claim. It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent." *Kulko, supra,* at 97.

There are a number of similarities between the instant case and *Webb*. A forum state which met the six month residency requirement of the UCCJA assumed jurisdiction to modify and out-of-state decree without regard to the continuing jurisdiction of the initial forum state, and without exercising personal jurisdiction over the non-resident defendant.

There is, however, one crucial difference. In *Webb* as in all previous cases involving competing custody decrees, at the end of the litigation process one judgment superseded the other.[8] To illustrate, when this Court denied jurisdiction in *Webb*, the Georgia decree superseded the Florida judgment because Georgia exercised personal jurisdiction over both parents.

On the other hand, should this Court fail to note probable jurisdiction, the New Jersey decree will not supersede the reaffirmed California judgment. New Jersey issued an *ex parte* modification of custody decree, and California did not and was not required to accord it full faith and credit. *May* v. *Anderson, supra,* at 533. Yet, that decree is valid in New Jersey.

Halvey speaks of the Full Faith and Credit Clause as a "command" that "requires the judgment of a sister

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[8]The term conflict or conflicting should be reserved only for situations where two decisions, judgments, or laws are inconsistent or contradictory, and when one does not supersede the other because they are both of equal validity. The most frequently cited case involving "conflicting decrees" in the area of child custody is *Pate* v. *Stout*, 209 Ga. 786, 75 S.E. 2d 748 (1953), *cert. denied*, 347 U.S. 968 (1954), and *Stout* v. *Pate*, 120 Cal. App. 2d 699, 261 P. 2d 788 (2nd Dist. 1953), *cert. denied*, 347 U.S. 968 (1954). When this Court denied certiorari, the California judgment automatically prevailed because it was the latter one, and that court also exercised *in personam* jurisdiction. Case cited in *Commissioners' Prefatory Note*, UCCJA, 9 U. L. A. 111, 112 (1979); Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 Col. L. Rev. 289, 308 n. 153 (1973); and Notes, *Pasqualone, supra*, at 359 n. 78.

State to be given full, not partial credit in the State of the forum." *Halvey, supra,* at 614. The Full Faith and Credit Clause, as it applies to custody decrees, is not for the purpose of placing a straight jacket on the power of a court of competent jurisdiction to modify an out-of-state judgment. It does, however, ensure that any modification rendered by a court of competent jurisdiction supersedes the decree which was modified. "Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in all other States." *Shaffer* v. *Heitner, supra,* at 210.

For obvious reasons, an *ex parte* divorce decree is the singular exception. *Williams* v. *North Carolina,* 317 U.S. 287 (1942). However, in the area of custody an anomoly exists. *Ex parte* modification of custody decrees have a "jurisdictional infirmity" sufficient to not require recognition by other states, but not sufficient to be invalid in the rendering state. Courts have it both ways while children and parents are traumatized by the impossible co-existence of two, equally valid, conflicting custody decrees.

In the event this Court fails to note probable jurisdiction, the legal stalemate over the status of the children will continue indefinitely. This being the court of last resort in the United States, there is no further legal recourse in this country. The United States will have failed to provide the elementary legal protection to the family required by Article 16, paragraph 3 of the United Nations Universal Declaration of Human Rights.

For children caught in this legal dilemma, continued residence in this country will mean either being confined to the jurisdiction of one of two states or be subject to ongoing parental abduction outside the reach of law in the remaining forty-eight where the rights of

the parents are equal and neither decree can lay greater claim to recognition.

Minor children of divorced parents have a constitutional right to the legal protection afforded by one, universally recognized, child custody decree. Failure to provide this protection constitutes a very serious violation of human rights. For this reason, messages urging this Court to review and resolve the tragic problem of two, equally valid, conflicting custody decrees were sent by the Lieutenant Governor of the State of California, the Los Angeles County Board of Supervisors, the Los Angeles City Council, the Board of Rabbis of Southern California, Church Women United, the Los Angeles West Association of American Baptist Ministers, the National Council of Jewish Women - Los Angeles Section, the Senate of Priests of the Catholic Archdiocese of Los Angeles, the Southern California Council of Churches, and television station KNXT-CBS in an editorial which was aired on September 21 and 22.

Common to all those messages is the insistence that the underlying constitutional issue responsible for conflicting child custody decrees be resolved now.

Dated: October 18, 1981.

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